

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Last Issue Date: October 23, 1999

Chapter 11 - PERFORMANCE BASED COMPENSATION

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1102(3) and Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to performance based compensation for investment advisers and investment adviser representatives is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected parties, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

002 Requirement. Notwithstanding the provisions of Section 8-1102(3)(a), an investment adviser or an investment adviser representative may enter into, perform, renew or extend an investment advisory contract that provides for compensation to the investment adviser or investment adviser representative on the basis of a share of the capital gains upon, or the capital appreciation of, the funds, or any portion of the funds, of a client, if the client entering into the contract subject to this section is a qualified client, as defined in Section 005.01 below.

003 Identification of the client. In the case of a private investment company, as defined in Section 005.03 below, an investment company registered under the Investment Company Act of 1940, or a business development company, as defined in section 202(a)(22) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(22)), each equity owner of any such company (except for the investment adviser entering into the contract and any other equity owners not charged a fee on the basis of a share of capital gains or capital appreciation) will be considered a client for purposes of Section 002 of this Rule.

004 Transition rule. An investment adviser or investment adviser representative that entered into a contract before the effective date of this Rule and satisfied the conditions of 48 NAC 18, Performance Based Compensation, issued February 25,

1992, in effect on the date that the contract was entered into will be considered to satisfy the conditions of this Rule. This Rule will apply with respect to any natural person or company who is not a party to the contract prior to and becomes a party to the contract after the effective date of these amendments.

005 Definitions. For the purposes of this Rule:

005.01 The term "qualified client" means:

005.01A A natural person who or a company that immediately after entering into the contract has at least \$750,000 under the management of the investment adviser;

005.01B A natural person who or a company that the investment adviser entering into the contract (and any person acting on his behalf) reasonably believes, immediately prior to entering into the contract, either:

005.01B1 Has a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than \$1,500,000 at the time the contract is entered into; or

005.01B2 Is a qualified purchaser as defined in section 2(a)(51)(A) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(51)(A)) at the time the contract is entered into; or

005.01C A natural person who immediately prior to entering into the contract is:

005.01C1 An executive officer, director, trustee, general partner, or person serving in a similar capacity, of the investment adviser; or

005.01C2 An employee of the investment adviser (other than an employee performing solely clerical, secretarial or administrative functions with regard to the investment adviser) who, in connection with his or her regular functions or duties, participates in the investment activities of such investment adviser, provided that such employee has been performing such functions and duties for or on behalf of the investment adviser, or substantially similar functions or duties for or on behalf of another company for at least 12 months.

005.02 The term "company" has the same meaning as in section 202(a)(5) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(5)), but does not include a company that is required to be registered under the Investment Company Act of 1940 but is not registered.

005.03 The term "private investment company" means a company that would be defined as an investment company under section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)) but for the exception provided from that definition by section 3(c)(1) of such Act (15 U.S.C. 80a-3(c)(1)).

005.04 The term "executive officer" means the president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions, for the investment adviser.

006 Nothing in the Rule, or the amendment of any previous rule regarding performance based compensation, shall be construed to alter the obligation of an investment adviser, as a fiduciary, to deal fairly with its clients and to make full and fair disclosure of its compensation arrangements, including disclosure of all material information regarding a proposed performance fee arrangement as well as any material conflicts posed by this arrangement.